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SERVICE DATE - FEBRUARY 11, 2000

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## SURFACE TRANSPORTATION BOARD

### DECISION

Section 5a Application No. 61

NATIONAL CLASSIFICATION COMMITTEE — AGREEMENT

Decided: February 9, 2000

The Surface Transportation Board grants, in part, reconsideration of its prior decision announcing an intention to approve renewal of the bureau agreement of the National Classification Committee only if the agreement is amended to provide for more effective shipper participation

#### BY THE BOARD:

In our prior decision in this proceeding, we announced that we intended to approve the bureau agreement of the National Classification Committee (NCC) only if (1) the agreement is amended to provide for more effective shipper participation and (2) the authority for collective publication of a standard bill of lading (which NCC describes as the “Uniform Bill of Lading” or “UBL”) is deleted from the agreement. Petitions for reconsideration were filed by the American Trucking Associations, Inc. (ATA), and by NCC. Replies in opposition to the petitions for reconsideration were filed by The National Industrial Transportation League (NITL); jointly by the Health and Personal Care Distribution Conference, Inc., and the National Small Shipments Traffic Conference, Inc. (HPCDC/NASSTRAC); and by the Transportation Intermediaries Association. In this decision, we grant the petitions for reconsideration insofar as the bill of lading issue is concerned, but otherwise deny them.

#### BACKGROUND

The provisions of 49 U.S.C. 13703(d) and (e), as adopted by the ICC Termination Act of 1995 (ICCTA), Pub. L. No. 104-88, 109 Stat. 803, limited rate bureau approvals to three years and provided that existing motor carrier rate bureau agreement approvals would expire on December 31, 1998, unless they were extended by the Board. To implement section 13703, we initiated a proceeding in a notice published in the Federal Register on November 13, 1997, at 62 FR 27653. After reviewing the extensive public comments filed in response to the November 1997 notice, we issued a decision on December 18, 1998 (the NCC Decision).<sup>1</sup> The NCC Decision found that

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<sup>1</sup> On December 18, 1998, we also issued a decision indicating our intent to approve the  
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classification can play a positive role in motor carrier pricing. At the same time, it found merit in the concerns expressed by shippers about their opportunities to participate in the classification process, and about the continued publication of the UBL in the National Motor Freight Classification (NMFC). Accordingly, the Board announced its intention to approve NCC's agreement only if appropriate changes were made to address these issues.

In response to a letter from the Republican and Democratic leadership of the Committee on Transportation and Infrastructure of the U.S. House of Representatives,<sup>2</sup> however, the Board decided to defer initiating a proceeding to effect appropriate changes to NCC's processes. The letter, which was received shortly before the NCC Decision was due to be issued, read in pertinent part as follows:

As you know, the Committee on Transportation and Infrastructure intends to pass legislation next year to reauthorize the Surface Transportation Board. As part of this reauthorization process, we will be reviewing a number of provisions contained in [ICCTA] related to motor carriers. . . . We therefore urge the Board to refrain from taking action in any case that would set major new policies or overturn existing practices in the motor carrier area before Congress has the opportunity to more fully consider and act upon these issues.

The Board thus postponed the effectiveness of the NCC Decision and the 1998 Decision, in order to give Congress time to move forward with legislation that would address the status of rate bureaus. The Board temporarily extended approval of existing agreements and, insofar as NCC is concerned, indicated that it would initiate further proceedings to provide for more shipper participation unless instructed otherwise, either by legislation, or by some other form of clear expression from Congress to the contrary.

## DISCUSSION AND CONCLUSIONS

ATA and NCC seek reconsideration of our finding that the classification process should be modified to permit more effective shipper participation, and of our finding that antitrust immunity

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<sup>1</sup>(...continued)

agreements of the rate setting rate bureaus only if class rates are reduced to reflect market-based levels. EC-MAC Motor Carriers Service Association, Inc., Et. Al., STB Section 5a Application No. 118 (Amendment No. 1), et. al. (STB served Dec. 18, 1998) (the 1998 Decision).

<sup>2</sup> The letter was signed by the Honorable Bud Shuster, Chairman; the Honorable James L. Oberstar, Ranking Democratic Member; the Honorable Thomas E. Petri, Chairman, Subcommittee on Surface Transportation; and Nick J. Rahall, II, Ranking Democratic Member, Subcommittee on Surface Transportation.

should not be given to publication of the UBL that NCC produces. We deny reconsideration as to the shipper participation issue, but grant it as to the bill of lading issue.

Increased Role of Shippers in Classification Process

ATA and NCC both assert that our prior decision improperly accepted, without question, the shippers' criticism of the classification process, which, ATA and NCC say, already provides for shipper participation. Thus, ATA and NCC argue that a further proceeding to attempt to improve the process should not be held.<sup>3</sup>

At the outset, we must say that we are surprised at the unwillingness of the trucking interests even to entertain suggestions for improving the classification process. Our NCC Decision, after all, did not even propose any particular condition on NCC to improve shipper participation. Rather, it simply found that, while the process gives shippers some rights,<sup>4</sup> it ought to be improved and opened up further. To object categorically to any inquiry into the process, without even knowing what proposals might be made, reflects a closed mind and in fact confirms our initial view that some changes may be appropriate.

And notwithstanding the arguments by ATA and NCC that the current state of shipper participation is adequate,<sup>5</sup> in the record there is ample evidence showing that, while shippers have not been altogether excluded from the classification process, the barriers to shipper participation are strong enough to produce a bias toward classification changes that overall result in rate increases.

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<sup>3</sup> Noting that there are transportation differences between ostensibly similar commodities such as candy canes and candy sticks, NCC also alleges that our statement (NCC Decision at 5-6) that the public perceives classification as involving "hairsplitting" reflects a misunderstanding of the classification process. Whether or not the public — or, for that matter, the Members of Congress who used the "candy cane/candy stick" example as a basis for abolishing the ICC — understands the transportation characteristics of candy canes or candy sticks has nothing to do with our conclusion that shippers must have more participation in the classification process.

<sup>4</sup> Our prior decision did not find that NCC has always ignored shipper views or that shippers with sufficient time and resources cannot influence the results of the classification process. However, because NCC is governed by its member carriers, there remains a need for procedural safeguards to ensure that proposals generated by NCC's staff or its member carriers are not biased toward classification changes that predominantly result in increased rates.

<sup>5</sup> Citing Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., 472 U.S. 284 (1985) (a case that did not involve a regulated entity seeking antitrust immunity), ATA also argues (Petition at 6) that procedural fairness is not required for standard setting organizations like NCC. Given the substantial rate implications associated with NCC's activities, however, we do not believe that it would be in the public interest to continue to grant immunity from the antitrust laws without regard to the fairness of the procedures under which the organization operates.

For example, shipper proposals for classification analysis must be financed independently by the shippers making the proposals, whereas carrier proposals do not face this limitation.<sup>6</sup> NCC's agreement lacks a formal mechanism whereby shippers may obtain all of the facts gathered, and studies conducted, by NCC staff to resolve classification issues. Shippers are provided only with select summaries of certain information used in classification studies.<sup>7</sup> The record reveals no mechanism whereby shippers may become aware of proposals or studies affecting their products early enough to be able to critique them effectively, rather than be faced with having to oppose them after they have been developed by NCC staff. Procedural bias against shippers should be corrected even though it can be argued that shippers have sometimes been able to overcome this bias.<sup>8</sup>

The view that shippers should have more effective input into the NCC process, which was clearly reflected in our NCC Decision, has been sanctioned by Congress. As noted, just before the NCC Decision and the 1998 Decision were to be issued, the leadership of both Parties of our authorizing committee of the House of Representatives suggested that Congress would be reviewing motor carrier rate bureau issues during 1999, and asked the Board not to proceed with any final decision until after such review was completed. Subsequently, the Board issued its decisions, telling Congress how it intended to proceed absent a directive to the contrary. In section 227 of the Motor Carrier Safety Improvement Act of 1999, H. R. No. 3419 (Nov. 19, 1999), Congress addressed the specific issues that were discussed by the Board in the NCC Decision and the 1998 Decision.<sup>9</sup>

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<sup>6</sup> See the statement NCC employees Beck and Ringer, filed on February 26, 1998, who state (at 3): "The NMFTA's staff conducts research projects on commodities only when expressly directed to do so by the NCC, a classification Panel or an individual carrier member." (Emphasis in original.) There is no mechanism to ensure that shipper requests for classification study are not arbitrarily denied.

<sup>7</sup> See ATA's Petition at 4. In their statement filed on February 26, 1998, at 9, NCC employees Beck and Ringer defended this practice as necessary to protect the confidentiality of the shippers from whom NCC gathers information. But pure classification analysis involves the technical analysis of the transportation characteristics of commodities and does not require revelation of the rate, volume, or origin-destination information that shippers would not want to have revealed. In any event, we are confident that NCC, in cooperation with organizations representing shippers, can devise ways to meet all legitimate confidentiality concerns, by means such as protective agreements.

<sup>8</sup> NCC argues that HPCDC/NASSTRAC overstate the extent to which carriers have prevailed in NCC decisions. Nevertheless, the record contains ample grounds for finding that classification changes that increase rates tend to prevail. See HPCDC/NASSTRAC's Reply Comments filed on February 26, 1998, at 14-15.

<sup>9</sup> NITL (on December 9, 1999), some of the rate bureaus (on December 15, 1999), and HCPDC/NASTRAC (on December 22, 1999) filed letters expressing their views on the effect of  
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Congress prospectively changed the 3-year periodic rate bureau review set up in ICCTA to a 5-year periodic review;<sup>10</sup> Congress directed the Board not to follow through with the intention expressed in the 1998 Decision to allow rate bureaus to operate on a nationwide basis; and particular Members of Congress expressed concern about the proposal in the NCC Decision to disallow collective action on the UBL; but in all other respects, Congress by its action did not stand in the way of the Board's going forward with the approach outlined in the 1998 Decision and the NCC Decision.<sup>11</sup> The Board's determination to initiate a proceeding to provide for more effective shipper participation into the classification process was essentially ratified by Congress in the 1999 motor carrier legislation.<sup>12</sup>

### Collective Establishment of Bills of Lading

The Board's determination to deny approval for the collective establishment of a UBL, by contrast, was not entirely ratified by Congress in the 1999 motor carrier legislation. The Board's decision was based principally on the conclusion that publication of the UBL is "wholly unrelated to the classification process," and that discussion of a uniform bill of lading "does not appear to require immunity at all." NCC Decision at 8. During the debate accompanying the introduction of H.R. 2679, The Motor Carrier Safety Act of 1999, however, Chairman Shuster and Congressman Rahall

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<sup>9</sup>(...continued)  
this legislation on these proceedings.

<sup>10</sup> In a letter received by FAX on February 8, 2000, Chairman Shuster and Congressman Rahall of the Committee on Transportation and Infrastructure, U. S. House of Representatives, express the view that the change from a 3-year to a 5-year periodic review requires maintenance of the status quo "until such time as any proceeding is initiated within the five-year process." We will not require any specific changes until we complete the proceedings that we are now initiating.

<sup>11</sup> In particular, the statute provides that "Nothing in section 227 [other than the directive not to allow nationwide expansion of rate bureau agreements], including the amendments made by [section 227], shall be construed to affect any case brought under this section that is pending before the Board as of the date of the enactment of this paragraph."

<sup>12</sup> On January 28, 2000, we received a letter from Chairman Shuster and Congressman Rahall of the Committee on Transportation and Infrastructure, U. S. House of Representatives. The letter expresses the view that the collective establishment of a bill of lading should be permitted, and that, in its 1999 motor carrier legislation, Congress intended that the public interest be defined in the context of the national transportation policy (NTP) factors found at 49 U.S.C. 13101. As discussed later in this decision, we are permitting the collective establishment of a bill of lading. And although the parties in their presentations generally did not address each of the NTP factors in detail, and thus the NCC Decision did not mechanically go through each one individually, we agree that the NTP is clearly relevant to any public interest determination we might make, particularly given the language of section 13703(a)(3).

engaged in a colloquy (Cong. Rec. H. 10074, daily ed. Oct. 14, 1999) concerning the issue. Congressman Rahall remarked:

[L]ast year the STB seemed to question whether the uniform bill of lading is regarded as part of the classification process. This clearly came as surprise because in doing so the STB ignored well-established precedent regarding [the] relationship of the UBL to classification.

Is it the gentleman's intention that the uniform bill of lading should continue to be part of the national motor freight classification?

Chairman Shuster responded:

[T]he uniform bill of lading has always been presumed to be part and parcel [of the] classification [process] that is based on well-established precedent, and the Congress anticipated no changes in this arrangement with enacting either the Trucking Industry Regulatory Reform Act of 1994 or the ICC Termination Act of 1995.

Given this discussion, which took place early in the legislative process, and which was not negated later in the process, we will grant the request of ATA and NCC that we allow NCC's agreement to continue to contain provisions for collective consideration of its UBL.<sup>13</sup>

However, we will be sensitive to any challenge that may be raised about any particular bill of lading that NCC may develop. HPCDC/NASSTRAC have identified several provisions in NCC's UBL that are of concern to their members. We have recognized in the past that any liability limitation imposed by a bill of lading should be effected in a way that gives the shipper actual notice

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<sup>13</sup> We disagree with petitioners' argument that we are statutorily precluded from terminating antitrust immunity for the collective establishment of bills of lading. Petitioners note that, under the motor carrier exemption provision of 49 U.S.C. 13541(e)(1), we may not exempt from regulation carriers' activities relating to loss and damage, or to procedures that we approve under section 13703. Petitioners then draw the inference that section 13541(e)(1) limits the activities as to which we may deny antitrust immunity under section 13703. But as HPCDC/NASSTRAC note, granting or denying an exemption and continuing, modifying or discontinuing antitrust immunity for collective actions are separate and distinct functions under the statute. A lack of authority to exempt an activity from regulation provides no basis for a finding that we must grant or continue antitrust immunity. Rather, what the statute says is that we may not condition our approval on continued compliance with laws, regulations, or orders under section 13703 and then turn around and exempt the carriers from those requirements under section 13541.

of the arrangement being undertaken.<sup>14</sup> We intend to allow continued collective action on bills of lading, but we will remain available to address complaints about the terms of any bill of lading that NCC may produce.

### SUMMARY

In summary, except as to the bill of lading issue, we find that reconsideration is not warranted, and we will initiate the proceeding contemplated in the NCC Decision.<sup>15</sup>

It is ordered:

1. The petitions for reconsideration are granted in part and denied in part, as set forth in this decision.
2. This decision is effective on February 11, 2000.

By the Board, Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn.

Vernon A. Williams  
Secretary

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<sup>14</sup> Amend the Uniform Straight Bill of Lading and Accompanying Contract Terms and Conditions, STB Docket No. ISM 35002 (STB served Dec. 24, 1997).

<sup>15</sup> We believe that our action here, which will further the goal that classification actions be fair and reasonable by promoting participation in the classification process by affected shippers, advances the relevant NTP factors. Because the statute expressly requires classifications to be reasonable, our decision should not have an improper adverse affect on those NTP considerations relating to carrier profits. And to the extent that our action facilitates the publication of reasonable classifications, it should affirmatively encourage competition and reasonable rates; it should meet shipper needs; and it should promote price and service options.